U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

'Notice: This is an electronic bench opinion which has not been verified as official'

Date Issued: August 6, 1998

Case No.: 1997-INA-535

In the Matter of:

WILLIAM DOAK,
Employer,

on behalf of

MAIZE MORALES,
Alien.

Appearances: Jean P. Karnos,
for Alien and Employer

Before: Burke, Guill and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Employer above, the head of a household of four, requests review of a denial of its application for alien labor certification by a U.S. Department of Labor Certifying Officer ("CO") for the position of Private Cook/Mexican Cook.[1] The issues on review are whether the position offered is a bona fide job that is full-time and clearly open to qualified U.S. workers in compliance with §§ 656.3, and 656.20(c)(8) and whether its job requirements are unduly restrictive in violation of § 656.21 (b)(2)(i)(A).

The job opportunity, as stated by Employer, required two years of experience in job offered, eight years of grade school, FBI clearance and a resume. Employee would work 40 hours a week for a wage of $12.20 per hour and the job duties were described as follows:

The position requires a person to cook, season and prepare meals, predominantly

[1]Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the implementing regulations at 20 C.F.R. Part 656.

> Mexican Cuisine, in a private household. The meals will be prepared in accordance with the employees instructions and or with recipes. Said occupant of this position will be required to prepare daily, fresh sauces such as marinera, baked goods and hand made corn and flour tortillas. He will also be required to clean and prepare produce, beef, fish poultry and pork. Occupant will broil, fry and roast meats. He/she will also plan menus, clean kitchen and cooking utensils and order food items and kitchen supplies.

(AF 51).

In the Notice of Finding ("NOF") the CO found the application in violation of 20 C.F.R. 656.3, there appeared to be no bona fide job opening that was clearly full-time; 20 CFR 656.20 (c) (8), the job did not appear to be truly open to U.S. workers; and 20 CFR 656.21(b)(2)(i)(A), the requirements for the position seemed restrictive. (AF 43-48). Since, there was a lack of documentation that the job duties for the position constituted full-time employment in the context of Employer's household, the CO requested specific information about Employer's household and the duties of the Cook. The CO also advised Employer to stipulate that he could afford to pay the salary for the worker by submitting evidence of its income. Further, the CO found that requiring the applicants to have a resume, FBI clearance, and experience with Mexican cuisine was unduly restrictive.

Employer's attorney submitted a rebuttal in the form of a letter, signed by Employer and counsel. In the letter he asserted that the parents of this household find it impossible to prepare meals for their children and themselves and that a cook is indispensable. Counsel attached proof of earnings to the letter proving its ability to pay the offered wage. [2]

He attempts to rebut the allegation that the special requirements are unduly by asserting that requiring a resume is justified because Employer must be assured that the applicant possesses the necessary qualifications to perform the duties, and a resume gives references who can be contacted to verify the applicants moral stature. Furthermore, requiring skill in Mexican cuisine is justified because Employer has found that a diet of this sort is healthy and promotes vitality, therefore he is compelled to seek this type of nourishment by a domestic cook, who can prepare Mexican cuisine. Finally, he contends that F.B.I. clearance is necessary to assure that an applicant has no criminal history. (AF 12-25).

Despite, Employer's assertions, the CO denied the application on the grounds that the job was not clearly full-time and not clearly open, and the requirements for the position were unduly restrictive. (AF 9-11).

Administrative-judicial review was requested and the file was referred to the Board of Alien Labor Certification Appeals. Employer requests that the (FD) be reversed.

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[2]However, because the CO accepted this as a rebuttal on this issue, we will not discuss this further.

DISCUSSION

Employer's requirements for F.B.I. clearance, having a resume, and experience with Mexican cooking are unduly restrictive, therefore the CO was correct to deny certification of this application. In accordance with 20 C.F.R. § 656.21 (b)(2)(i)(A) the use of unduly restrictive job requirements in the recruitment process is proscribed. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21 (b)(2)(i)(A) is to ensure the job opportunity is available to qualified U.S. workers. ***Venture Int'l Assoc.,*** 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation, or that it is included in the Dictionary of Occupational Titles (DOT), the employer is required to establish the business necessity for the requirement.

The Board defined how an employer can show "business necessity" in ***Information Industries****, Inc*., 88-INA-82 (Feb. 9, 1989) (*en banc*). The ***Information Industries*** standard requires that the employer show:

1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and
2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

To demonstrate business necessity Employer must show factual support or a compelling explanation. ***ERF****, Inc*., 89-INA-105 (Feb. 14, 1990). Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. ***Robert Paige & Assoc.*** 91-INA-72 (Feb. 3, 1993).

In the case at bench, the CO found that the requirements of having a resume, F.B.I. clearance and experience in Mexican Cooking are unduly restrictive. Consequently, the CO advised Employer to either establish the business necessity of the requirements or delete the requirements. (AF 24).

In its rebuttal, Employer's attorney, attempting to establish business necessity, contended that Employer finds a diet of Mexican Cuisine beneficial to the promotion of good health and vitality; that requiring a resume assures Employer that the applicant has the requisite qualifications and has references who can attest to his/her moral character; and F.B.I. clearance is necessary to insure that this person does not have any criminal history, because s/he will be left alone in Employer's home.

We find Employer's rebuttal to be inadequate to establish the business necessity of its special requirements. Each of the requirements amounts to no more than a preference and is highly discouraging to U.S. applicants. In an industry where it is common for domestic workers

to hand write letters of application in response to advertisements for job openings, requiring a resume could discourage many potential applicants from applying, which is in direct contrast to the reason for § 656.21 (b)(2)(i)(A). This requirement is not normal for this occupation and it is not necessary for the position in question. Employer does not establish a compelling explanation or factual support for why the cook must have two years experience in Mexican cooking. Because the DOT does not provide for specialty domestic cooks, Employer must establish business, necessity for the requirement of 2 years in Mexican cooking. Employer's rebuttal fails in this regard. Employer has not documented why a worker with two years of experience as a domestic cook could not adequately cook to Employer's taste. Lastly, requiring F.B.I. clearance for a domestic cook is atypical for this position. We are under the belief that the average person does not know what to do to obtain one's personal FBI file. Though Employer asserts that this requirement is meant to minimize the possibility of hiring a criminal to work in his home many qualified applicants would see this as an arduous task and it would chill their interest. Further, there are less restrictive means to verify the behavior of a worker, i.e. references from past employers. We find that this requirement bears no relationship to the performance of the job in question.

Employer has not met its burden of establishing the business necessity of its special requirements, and we need not address the other grounds for denial. Accordingly, Employer's experience requirements are in violation of the regulations and the CO's denial of labor certification is proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

SO ORDERED.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.